

J. Eric Ivester
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000

Thomas J. Allingham II
Anthony W. Clark
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
Telephone: (302) 651-3000

Counsel for Statek Corporation

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
:
In re: : Chapter 11
:
COUDERT BROTHERS LLP, : Case Nos. 06-12226 (RDD)
:
:
Debtor. :
:
----- x

**APPELLANT'S SECOND AMENDED DESIGNATION OF
CONTENTS OF RECORD FOR APPEAL**

Statek Corporation ("Statek" or "Appellant"), having filed an Amended Notice of Appeal on November 7, 2013 from the order of the United States Bankruptcy Court for the Southern District of New York (Drain, J.) (the "Bankruptcy Court") entitled Order Denying Statek Corporation's Second Motion for Reconsideration (the "Second Reconsideration Order") (Docket No. 1610) dated October 25, 2013, and having previously filed a Notice of Appeal (Docket No. 1564) from the Order On Remand Denying Statek Corporation's Motion For Reconsideration, dated August 23, 2013 (the "Order on Remand") (Docket No. 1552), and the Memorandum Of Decision On Remand On Statek's Motion For Reconsideration Of Claim

Disallowance Order, dated August 19, 2013, attached to the Order (the "Memorandum Decision") (Docket No. 1550) (collectively, the "Prior Notice of Appeal"), now hereby amends its Designation of Contents of Record for Appeal (the "First Designation") (Docket No. 1569) and its Amended Designation of Contents of Record for Appeal (the "Amended Designation" and collectively with the First Designation the "Prior Designations") (Docket No. 1621) by and through its undersigned counsel and pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure, to include the following items¹ in the record on appeal and in addition to those previously listed in the Prior Designations:

In re Coudert Brothers LLP, United States Bankruptcy Court for the Southern District of New York (06-12226)		
Filing Date or Document Date:	Docket Number (if applicable):	Description:
October 24, 2013	Attached as Exhibit A	Transcriber's Edited ² Hearing Transcript from October 24, 2013 hearing

¹ Each designated item includes any exhibits to such item. Each reference to "Docket #__" includes all documents within that Docket number.

² The November 7, 2013 Amended Designation contained the transcriber's unedited transcript of the October 24, 2013 hearing. On November 12, 2013, the transcriber emailed counsel the edited copy of the October 24, 2013 hearing transcript.

Dated: New York, New York
November 14, 2013

Respectfully submitted,
/s/ Anthony W. Clark
J. Eric Ivester
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Fax: (212) 735-2000
eric.ivester@skadden.com

- and -

Thomas J. Allingham II
Anthony W. Clark
Skadden, Arps, Slate, Meagher & Flom LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
Telephone: (302) 651-3000
Fax: (302) 651-3001
thomas.allingham@skadden.com
anthony.clark@skadden.com

Counsel for Statek Corporation

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: : 06-12226 (RDD)
:
COUDERT BROTHERS, LLP : 300 Quarropas Street
: White Plains, New York
Debtor. :
-----X October 24, 2013

TRANSCRIPT OF STATEK CORPORATION'S SECOND MOTION FOR RECONSIDERATION OF THE COURT'S ORDER ON REMAND DENYING STATEK CORPORATION'S MOTION FOR RECONSIDERATION AND MEMORANDUM OF DECISION ON REMAND ON STATEK'S MOTION FOR RECONSIDERATION OF CLAIM DISALLOWANCE ORDER; MOTION TO STRIKE DOCUMENTS CONTAINED IN APPELLANT'S DESIGNATION OF CONTENTS OF RECORD FOR APPEAL FILED BY KAREN S. FRIEMAN ON BEHALF OF DEVELOPMENT SPECIALISTS, INC.; OBJECTION TO MOTION OBJECTION TO PLAN ADMINISTRATOR'S MOTION TO STRIKE DOCUMENTS CONTAINED IN APPELLANT'S DESIGNATION OF CONTENTS OF RECORD FOR APPEAL FILED BY CHRISTINE OKIKE ON BEHALF OF STATEK CORPORATION BEFORE THE HONORABLE ROBERT D. DRAIN UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Development
Specialists:

KAREN S. FRIEMAN, ESQ.
DAVID S. TANNENBAUM, ESQ.
Stern, Tannenbaum & Bell
380 Lexington Avenue
New York, New York 10168

Court Transcriber: SHARI RIEMER
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 (Proceedings began at 10:50 a.m.)

2 THE COURT: Okay. Coudert. So this is Statek's
3 current or second Rule 59 motion.

4 MR. CLARK: Good morning, Your Honor. Tony Clark
5 and Eric Ivester, Skadden Arps for Statek. It's always
6 pleasure to appear in Your Honor's courtroom.

7 THE COURT: It's been a while but it's nice to see
8 you too.

9 MR. CLARK: The last time -- these digs are a little
10 bit better than the digs down in Bowling Green. I like it up
11 here.

12 THE COURT: Okay.

13 MR. CLARK: Look, Your Honor, I'm happy to discuss
14 whatever the Court might find helpful and I know that Your
15 Honor often has your own ideas about what the focus ought to
16 be at a hearing like this but for my part I can try to be
17 brief and get straight to the point.

18 THE COURT: Okay.

19 MR. CLARK: In the Court of Appeals February 2012
20 decision from the prior denial of Statek's first
21 reconsideration motion the Court "remanded the --" "remanded
22 in part to the bankruptcy court with instructions to apply
23 Connecticut's choice of law rules in deciding Statek's motion
24 to reconsider.

25 Respectfully, Your Honor, I don't think there's any

1 way to read that instruction as leaving any discretion in this
2 Court to do --

3 THE COURT: All right. But I already decided that. I
4 mean I had supplemental briefing on that issue and I decided
5 to the contrary.

6 MR. CLARK: You did. You did, Your Honor. So in
7 response to our current motion what the plan administrator has
8 argued is that we failed to show either number one, an
9 intervening change in the law or number two, any facts that
10 were overlooked by the Court on the remand decision, either of
11 which would be sufficient to warrant the Court's
12 reconsideration on that remand decision. We disagree. We
13 think we've shown both of those.

14 First, on the change in the applicable law, the plan
15 administrator is now arguing, appears to be arguing that the
16 burden is on Statek to show that its complaint was timely
17 filed under what we all know now is controlling Connecticut
18 law on the statute of limitations and that Statek failed to do
19 so and that it's too late now to permit Statek to amend its
20 complaint to plead facts showing timeliness. To the extent
21 the Court agrees with that analysis and those assertions, that
22 would reverse the normal burden on what Your Honor held was a
23 12(b)(6) motion to dismiss.

24 THE COURT: But what is the change in -- what is the
25 change in intervening law?

1 MR. CLARK: It's the law of Rule 12(b)(6), Your
2 Honor. On a (12)(b)(6) motion, which is what the Court
3 indicated it was treating the motion to disallow our claim
4 as --

5 THE COURT: Right.

6 MR. CLARK: -- it is up to the moving party to show
7 on the face of the complaint, the allegations that are made
8 that there is no basis for relief and in this case that means
9 that the complaint shows on its face that it was not timely
10 filed. It's not a burden on Statek to show that the complaint
11 was timely filed and at the remand hearing, Your Honor I think
12 what Your Honor said or indicated was that if you were to get
13 to the merits of the reconsideration motion and ultimately the
14 disallowance motion Your Honor appeared to recognize that in
15 that situation you would deny the disallowance motion because
16 you couldn't tell as a matter of fact from the allegations
17 that were made that the complaint was not timely filed.

18 If the Court now agrees with what the plan
19 administrator is arguing that would reverse that presumption.

20 THE COURT: But that's -- well --

21 MR. CLARK: And that would be the change in law, Your
22 Honor.

23 THE COURT: But that's just saying I was wrong,
24 right, that I interpreted the law incorrectly?

25 MR. CLARK: No, I don't think --

1 THE COURT: I think the change in law prong is to
2 reflect literally a change in the law, not something that the
3 deciding -- the trial court did contrary to the law.

4 MR. CLARK: And all I'm saying, Your Honor, is that
5 as I understand this record and I've been trying to wade
6 through it. I'm at a disadvantage to the Court and the plan
7 administrator's counsel. You've all have been living with
8 this for years and I for weeks but the change in the law in
9 effect appears to be that because our claim is being denied
10 and Your Honor was applying Connecticut statute of limitations
11 law Your Honor had indicated at the hearing that under that
12 law you did not see a basis for determining on the face of the
13 complaint that it was not timely filed and yet it is still
14 being disallowed or in Rule (12)(b)(6) --

15 THE COURT: Well, I think that -- I think that is
16 really a misreading of the opinion. I applied Connecticut law
17 to the issue of whether the complaint was timely, or, to the
18 contrary, time barred, and concluded that it could be timely
19 if certain facts were shown, and some of those facts I think
20 you do have a burden on as far as tolling is concerned.

21 MR. CLARK: Right.

22 THE COURT: But at the end of the day I concluded
23 that was neither here nor there because it didn't matter,
24 because the second basis for my original order --

25 MR. CLARK: The alternative holding.

1 THE COURT: Right. Is what was controlling. And
2 basically the only conclusion I took from the application of
3 Connecticut law was that there was nothing that came out and
4 slapped you over the head -- slapped me over the head and said
5 well, this was a miscarriage of justice. There's nothing that
6 special about Connecticut law that would override the very
7 powerful rule that one should not be allowed to raise new
8 issues after the fact.

9 MR. CLARK: So let me get to that.

10 THE COURT: Okay.

11 MR. CLARK: And frankly I do think that is clearly
12 the more important of the two points that I wanted to discuss
13 here.

14 THE COURT: Just to be clear, as far as change of
15 law, I mean when I first read the motion I thought well, maybe
16 they're arguing that the change in law was the Second
17 Circuit's determination under Ferens and Van Dusen that I
18 should apply Connecticut law, but to me that's not really a
19 change in law because you all argued that in 2009.

20 MR. CLARK: I appreciate that.

21 THE COURT: So -- but this other point I don't think
22 really is --

23 MR. CLARK: In fairness to Your Honor in your opinion
24 you did do the analysis under Connecticut law and came to the
25 conclusion that you really couldn't come to the ultimate

1 conclusion.

2 THE COURT: To the ultimate conclusion.

3 MR. CLARK: One way or the other and all I was
4 saying is that if that's all that was before the Court and it
5 was on the disallowance motion then it gets denied because --

6 THE COURT: Well, I agree with that, but it wasn't
7 all that was before the Court and it was really -- I think I
8 said this on Page 28 of the Lexis cite. It states, "Statek
9 asserts that as long as the application of Connecticut choice
10 of law principles would force a determination of the facts on
11 the tolling issue the Court must vacate the reconsideration
12 order. This argument, however, ignores the limited and
13 extraordinary nature of reconsideration under Rule 59;" and
14 then that leads into the Rule 59 discussion.

15 MR. CLARK: On that prong, Your Honor, and as I read
16 through my notes and did a word count I find the word
17 respectfully shows up an awful lot of times so I want the
18 Court to understand that these are respectful arguments but it
19 does appear to me anyhow, and I am the new kid on the block.
20 I haven't lived with this thing the way you all have for many
21 years but it did appear to me -- it does appear to me that the
22 Court may have overlooked a critical fact, a procedural fact
23 but a critical fact in reaching your decision on remand that
24 the alternative holding from the original reconsideration
25 ruling that Statek didn't timely raise the Connecticut law

1 argument and that Connecticut law and not New York applies as
2 the Court of Appeals has now held, that that argument wasn't
3 raised on the appeal to the Second Circuit and therefore
4 wasn't decided.

5 I think the appeal record shows that the issue was
6 in fact raised and that it was necessarily if implicitly --
7 certainly wasn't discussed in those terms. The Second Circuit
8 didn't say as for Judge Drain's alternative holding we do the
9 following. So when I say implicitly that's what I'm
10 acknowledging, that it was decided by the Court.

11 Now, Your Honor found, and I apologize that --
12 because we keep talking about timeliness here, that I didn't
13 raise this issue earlier.

14 THE COURT: This came up in the reply.

15 MR. CLARK: Well, I'll tell you how it happened, Your
16 Honor. We filed the motion for, the second motion for
17 reconsideration and then in over the transom came this motion
18 to strike which I think is technically on today and I won't
19 any adjectives to describe it but as I read the motion to
20 strike it was a very simple motion. I'm sitting there and I
21 was reading it and I have my own thoughts about how to respond
22 to it on the merits of the motion to strike and in the middle
23 of the motion or towards the end of the motion was this short
24 but passionate argument that really had nothing to do with the
25 motion to strike about what the Second Circuit did have argued

1 before it and did or did not consider and a light went off in
2 my head. Your Honor had said in your remand decision that
3 Statek hadn't raised the alternative holding issue before the
4 Second Circuit.

5 Now, we respectfully disagree on the grounds that
6 the entire thrust of Statek's appeal was that the
7 reconsideration should have been granted because the Court
8 applied New York law and should have applied Connecticut law
9 and that it was an abuse of discretion to do so. The brief
10 doesn't say it in these words but it was a -- that law should
11 have been applied regardless of when the issue first came up.
12 But Your Honor said Statek hadn't raised the issue on the
13 appeal and therefore the Court of Appeals because it hadn't
14 been raised by Statek couldn't have considered it and couldn't
15 have implicitly decided it.

16 As I was reading the motion to strike it struck me,
17 this paragraph making this argument on the merits about what
18 was and wasn't considered in the Second Circuit struck me as a
19 little Shakespearian. Me thinks they protest too much. Why
20 are they making this argument in this brief, and the light
21 that went off was, you know, I did go back after I read Judge
22 Drain's remand decision and I read everything that Statek
23 filed in the Second Circuit Court of Appeals. But what I
24 hadn't focused on was what the plan administrator had filed
25 and Your Honor didn't say anything in your remand decision

1 about what the plan administrator had filed either. So I
2 thought I should go read their brief. I had read it once
3 quickly but I went back and I read it again not so quickly and
4 carefully and what I found in that brief was a concise short
5 to the point but I think squarely on point argument that Your
6 Honor's decision should have been affirmed based on the
7 alternative holding and it's what we quote from Page 10 of
8 their brief in the Second Circuit Court of Appeals, the quote
9 being Statek --

10 THE COURT: Right. I've read it.

11 MR. CLARK: And the one point I wanted to make about
12 that, Your Honor, it is concise. Clearly it wasn't the
13 central point of their papers. It wasn't the central point of
14 the appeal. It was a point that was made and the emphasis on
15 the word not is super concise but it gets to the timeliness
16 point. So by making that argument before the Court of Appeals
17 perhaps they could have made it more forcefully. They could
18 have made it at greater length. They could have made it more
19 impassioned. I don't know, but they made the argument and
20 maybe today they wish they hadn't but they did.

21 So, Your Honor, I believe on the basis of that brief
22 that the argument was presented to the Court of Appeals and
23 the Court of Appeals necessarily presumptively considered it
24 and rejected it in holding as it did. Again, what the Court
25 of Appeals said, and I think they meant what they said when

1 they said, "remand in part to the bankruptcy court with
2 instructions to apply Connecticut choice of law rules in
3 deciding Statek's motion to reconsider," I think they were
4 instructing and directing that you get to the merits of that
5 motion and do so applying Connecticut law and respectfully I
6 think the first half, three-quarters of your remand decision
7 does that. It just comes up short of doing the last piece
8 which says therefore reconsideration is granted disallowing --
9 the prior decision is vacated and the disallowance motion is
10 denied. I think by not doing that and going on to the
11 alternative holding which is as I say I think was fairly
12 presented to the Court of Appeals. Your Honor failed to,
13 respectfully failed to implement the mandate on remand.

14 Now, just one last point, Your Honor, on the
15 timeliness.

16 THE COURT: Well, on this point --

17 MR. CLARK: Yes.

18 THE COURT: -- again you're right. You and your
19 firm weren't involved until recently on this matter. I did
20 raise the issue of the alternative holding at the hearing on
21 remand and I directed the parties file supplemental briefs on
22 it including the issue of the effect of the remand, whether it
23 in fact remands as to -- is the law of the case and basically
24 says that this is what in effect the Court shall as long as
25 Connecticut law can provide an avenue for a complaint here

1 that's the end of the story. No one raised this point, again.
2 I mean it's like deja vu all over again I think.

3 MR. CLARK: Actually, Your Honor, and I want to -- I
4 want the record to be as clear as it can be.

5 THE COURT: Okay.

6 MR. CLARK: My predecessor counsel actually in the
7 supplemental briefing on the remand that Your Honor asked for
8 at the hearing --

9 THE COURT: Right.

10 MR. CLARK: -- it filed a piece of paper which I
11 will tell you says something different than what I just said
12 to you about what was in fact raised on appeal before the
13 Court of Appeals. What they said, and I point it out in
14 fairness so Your Honor is specifically aware of this, at Page
15 4 of their supplemental brief note 1, and they're talking
16 about what they call the technical rule. That's their words
17 for your alternative holding. They say, "Counsel for Coudert
18 raised the technical rule on appeal to Judge Hellerstein in
19 the District Court. Judge Hellerstein did not affirm the
20 denial of the motion for reconsideration on that basis but
21 ruled on the legal question on the merits. On the following
22 appeal to the Second Circuit counsel for Coudert was correct
23 [not -] in not raising the technical rule and only arguing the
24 issue on the merits. The technical rule was no longer an
25 issue after the District Court's de novo review." That's what

1 they argued.

2 THE COURT: Right.

3 MR. CLARK: I'm not throwing stones, Your Honor, but
4 they were wrong. They were wrong about that, and when we go
5 up on appeal if we go up on appeal if Your Honor sticks to the
6 remand decision, I wouldn't want it said to the Court of
7 Appeals that I didn't raise this directly with Your Honor
8 because however the Court views it I think the Court of
9 Appeals, the appeals court will find it helpful to have your
10 thoughts with the argument squarely presented to you. As I
11 said, it's -- the argument they made about your alternative
12 holding is one paragraph in a 60 page brief and -- so as I
13 say, it's concise but it's there and that's the fact that I
14 don't think or at least it doesn't appear has been fully
15 considered by the Court in connection with the remand and
16 that's why I think that's the most important reason why --

17 THE COURT: Okay.

18 MR. CLARK: -- reconsideration should be granted.

19 THE COURT: I interrupted you. You were going to say
20 something else about timeliness, I think.

21 MR. CLARK: I was going to quote Felix Frankfurter,
22 Your Honor. Wisdom some -- too often wisdom doesn't come at
23 all so we shouldn't reject it when it comes late. We've been
24 making these arguments --

25 THE COURT: I have to tell my children that. They'll

1 really like that.

2 MR. CLARK: I tell my children that all the time and
3 you know what they say to me, Felix Hot Dogs. I don't think
4 it sunk in with them either.

5 Your Honor, if the Court has any other questions I
6 can respond to it. I'd be pleased to address it.

7 THE COURT: Well, this motion was coupled with the
8 request to -- for leave to amend the complaint.

9 MR. CLARK: Yes.

10 THE COURT: And I think that -- I mean to my mind at
11 least that request -- I was trying to imagine what the
12 complaint, would look like. I think what it would look like,
13 the amended complaint, would be one that would lay out more
14 facts to justify tolling.

15 MR. CLARK: Yes. In some it would say that they --
16 just so everybody knows, it would say that Coudert -- neither
17 Coudert nor Statek ever purported to terminate the
18 relationship prior to the filing of the lawsuit at issue here.
19 So it would say that and it would also point out that then and
20 now Coudert had an obligation to turn over all the property
21 and files and they still haven't done it. That's the gist of
22 the argument.

23 THE COURT: But -- that's fine and that is consistent
24 with what I thought at a minimum would be in your mind, but to
25 me I don't think a complaint needs to allege that. I think

1 that the tolling issue is something that is raised in response
2 to a defense and therefore you don't need to put those facts
3 in the complaint.

4 MR. CLARK: Exactly.

5 THE COURT: So it seems to me that's kind of a red
6 herring.

7 MR. CLARK: Well, that -- candidly, Your Honor, your
8 statement just now on the record really does take care of the
9 first argument that we made about the change in the law. Your
10 Honor clearly isn't intending to apply any different
11 presumption on a (12)(b)(6) motion --

12 THE COURT: No.

13 MR. CLARK: -- that otherwise would be applied. So
14 that takes care of that.

15 THE COURT: Okay.

16 MR. CLARK: The real issue then is whether the Court
17 has as a matter of procedural facts considered what was in
18 fact argued by the other side through the Second Circuit and
19 therefore was considered by the Second Circuit in ruling as it
20 did. And as I say, I think however Your Honor comes down on
21 that I think the appellate courts would probably benefit from
22 your thoughts on it.

23 THE COURT: Well, since you're still standing up
24 let's go to the other motion, the motion to strike.

25 MR. CLARK: The motion to strike?

1 THE COURT: Right. To me it is -- they can always go
2 and look at the ruling on reconsideration but I'm not sure the
3 briefing is really that relevant to it. It's really the
4 ruling, isn't it, or the record of today's hearing? I'm just
5 not sure it's -- it just to me it's sort of a cluttering up of
6 the record although I'm assuming you would appeal the motion
7 to reconsider too so that would be in front of it anyway.

8 MR. CLARK: That was exactly my point in the reply,
9 Your Honor, and it will be and I agree -- having served as an
10 appellate clerk not in the federal courts but to the Delaware
11 Supreme Court I appreciate an uncluttered record. I did then
12 and I suppose -- I expect the clerks now do read those
13 records. Given the sort of technical pitfalls that Statek is
14 running in the past I'm confident that -- well, really
15 confident that you're going to grant my second reconsideration
16 motion but if I get that wrong we will as a matter of
17 providing the entire record to the appellate courts I'm sure
18 we'll put in -- we'll designate their brief, our briefs, this
19 transcript and Your Honor's decision, whatever it is. So that
20 was why I said their motion was I think to give them -- to
21 give the devil his due, I think it was a technically correct
22 motion but an unnecessary one because this is all going to go
23 up one way or another.

24 THE COURT: Anyway. Okay. All right. That's fair.

25 MR. CLARK: Thank you, Your Honor.

1 THE COURT: Okay.

2 MS. FRIEMAN: Good morning, Your Honor. Karen
3 Frieman, Stern, Tannenbaum & Bell with my partner David
4 Tannenbaum.

5 MR. TANNENBAUM: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MS. FRIEMAN: I'll be really brief because I more or
8 less agree with the comments that Your Honor made in response
9 to Mr. Clark's assertions about that there's been no change in
10 the controlling law including regarding Rule (12)(b)(6) or in
11 connection with any of the issues of law that Your Honor did
12 tackle in the decision on remand. So I just really briefly
13 want to address this idea that the Court overlooked something
14 in ruling on the motion on remand and in particular the claim
15 that it overlooked that the plan administrator put the Rule --

16 THE COURT: The paragraph, the paragraph in the
17 appellate brief.

18 MS. FRIEMAN: The paragraph in the appellate brief;
19 and honestly, Your Honor, I don't think that there's any way
20 that that paragraph could be read as the plan administrator
21 putting that issue before the Second Circuit. In fact, prior
22 counsel for Statek, Hughes Hubbard said exactly the opposite.
23 So let me take a step back and break it into two pieces.

24 First of all, Your Honor couldn't have overlooked it
25 when you ruled on the remand because no one brought it to your

1 attention and in fact Hughes Hubbard argued the opposite or
2 conceded the opposite. So for that reason alone
3 reconsideration isn't appropriate.

4 But on the second hand I do not think that there's
5 any way you can give a fair reading of that one paragraph
6 which was contained not in an argument section but -- in our
7 brief but in the statement -- in the statement of the case
8 describing what the prior decision had been, and I'm sure that
9 Your Honor has read it for yourself. I don't want to take the
10 time to read it into the record.

11 THE COURT: No, I read it.

12 MS. FRIEMAN: I don't think that that's a fair
13 construction that that put it into play. And moreover, Your
14 Honor, I submit that the question is whether appellant raised
15 that issue on appeal in the Second Circuit. The cases speak
16 about if something is not raised it's waived, that if the --
17 if they did not challenge it then it couldn't have been
18 decided. So I think that it would be -- that paragraph --
19 there's no way that paragraph could be viewed as the issue
20 having been presented to the Second Circuit or decided on it.

21 And I also think that that argument is inconsistent
22 with what the Second Circuit ultimately did. The Second
23 Circuit did not reverse the denial of reconsideration and
24 order the Court to address the disallowance motion under
25 Connecticut law. It remanded the motion for reconsideration

1 itself to the Court for your reconsideration, which obviously
2 we think you properly did applying Rule 59.

3 The only other point that I would make very briefly,
4 Your Honor, and it's an argument that hopefully we'll never
5 have to have but because Mr. Clark mentioned it I just want to
6 briefly comment on it, and that is he indicated that if the --
7 they did some day amend the complaint or even if we didn't we
8 understand I guess now what their argument would be on the
9 merits if it came to that, that neither Coudert nor Statek
10 purported to terminate the relationship, the attorney-client
11 relationship but as we've established in some set of briefing
12 along the way here there's no -- there's no requirement in the
13 law that someone take affirmative steps.

14 THE COURT: But that's for the future. I mean
15 that's --

16 MS. FRIEMAN: Right. Yes, that's correct.

17 THE COURT: That's not --

18 MS. FRIEMAN: So --

19 THE COURT: -- before me today.

20 MS. FRIEMAN: Then I guess the last thing I want to
21 just very briefly touch on is our motion to strike the
22 contents of designations of the record -- from the
23 designations of the record and tell you where we were coming
24 from when we made it. At the time they designated -- made the
25 designations the only notice of appeal that was pending was

1 the notice of appeal from the decision on remand. Their
2 motion papers in support of their -- the present motion for
3 reconsideration is not part of the record on that decision. I
4 had not even filed our opposition papers so I couldn't --
5 certainly couldn't counter designate.

6 THE COURT: Right.

7 MS. FRIEMAN: Now, they now say that if Your Honor
8 rules against them they'll appeal from this ruling and it will
9 all go up anyway and that's fine. I have no problem with that
10 but at that moment --

11 THE COURT: That's fine. I think Mr. Clark is right;
12 technically it was right and this is an area where I -- what's
13 done on appeal where technicalities really count still. So I
14 don't have a problem with that.

15 MS. FRIEMAN: Thank you, Your Honor. So unless you
16 have any other questions that's all I really wanted to comment
17 on.

18 THE COURT: All right. Well, I have before me,
19 first, a motion by Statek Corporation for reconsideration
20 under Bankruptcy Rule 9023, which incorporates Federal Rule of
21 Civil Procedure 59, my order on remand denying Statek's prior
22 motion for reconsideration, also under Rule 9023 incorporating
23 Federal Rule of Civil Procedure 59. The present motion, which
24 I admit has a certain flavor of an Escher drawing or more
25 colloquially putting on a wet bathing suit for the second time

1 feel to it, seeks reconsideration of, again, an order denying
2 reconsideration on remand of a prior order of the Court. The
3 circumstances are laid out in my memorandum of decision, which
4 appears at In re: Coudert Brothers LLP, 2013 Bankr. Lexis 3360
5 (August 19, 2013). The standard for consideration of a Rule
6 59 motion is well established and is discussed at unusual
7 length in that opinion, and I won't repeat it here except to
8 state that it is viewed as a request for extraordinary relief,
9 that it is not a vehicle for a second bite at the apple or
10 relitigating the underlying motion on the merits but, rather,
11 should be granted in limited circumstances. That is, where
12 the Court made a clear error of law (which is essentially an
13 opportunity for the Court on its own to correct an obvious
14 mistake), or ignored or overlooked controlling decisions or
15 factual matters that might have materially influenced the
16 earlier decision, or to prevent manifest injustice.

17 Here, Statek asserts three grounds for
18 reconsideration. The first two are fairly easily disposed of.
19 First, Statek contends that the Court made a clear error of
20 law in determining that the Second Circuit's remand, as
21 discussed in the memorandum of decision that I previously
22 cited, was the law of the case not only with respect to the
23 specific direction in the remand, which is to apply
24 Connecticut choice of law principles to the Court's
25 determination of whether Statek's claims are timely or as the

1 Court had previously found in its first order denying
2 reconsideration are not timely, controls also with respect to
3 the second basis for the Court's prior order denying the prior
4 motion for reconsideration, which is that the motion should be
5 denied because the basis for Statek's contention that the
6 claims were indeed timely had not been argued to the Court
7 previously.

8 I had invited not only argument but additional
9 supplemental briefing on that very issue on remand. I
10 received the parties' supplemental briefs and concluded in the
11 memorandum of decision that appears at 2013 Bankr. Lexis 3360
12 that in fact the remand did not apply to the second basis for
13 my prior reconsideration order, which is also the basis for
14 which I on remand denied the motion for reconsideration. So
15 that really is at this point only a proper topic for appeal
16 as, opposed to one for reconsideration.

17 Secondly, Statek argues that there's been a change
18 in the controlling law since the Court's determination of its
19 original reconsideration motion. As I stated during oral
20 argument, I had originally thought that this argument by
21 Statek was premised upon the Second Circuit's determination
22 that led to the remand order that Van Dusen v. Barrack, 376
23 U.S. 612 (1964), and Ferens v. John Deere Co., 494 U.S. 516
24 (1990), required the application of Connecticut choice of law
25 principles. However, it appears clear from oral argument

1 today that that was not the point made by Statek in the
2 present motion before me nor could it have been since that was
3 the basis for Statek's appeal. It was also the basis for
4 Statek's original motion for reconsideration which you made in
5 2009, and it really is not the type of change in controlling
6 law that a Rule 59 motion should be based upon.

7 Instead, Statek has argued that the Court in the
8 memorandum of decision at 2013 Bankr. Lexis 3360 ruled the way
9 it did because it placed or shifted the burden in a new way
10 with regard to the assertion of the affirmative defense of the
11 statute of limitations and the counter-assertion of tolling
12 principles under Connecticut law. This is premised on the
13 fact that in the first portion of the memorandum of decision
14 after I concluded that Connecticut law would recognize tolling
15 under certain circumstances I further concluded that on the
16 present record those circumstances had not been established.
17 From that, Statek apparently believed that I had further
18 reached the conclusion that it had failed to show tolling for
19 purposes of (12) (b) (6). That, however, is not the case.

20 I believe it's clear from my memorandum of decision
21 (but if it isn't it should be clear now) that I concluded
22 merely that the answer on whether Connecticut law would permit
23 the assertion of Statek's claims or, to the contrary, would
24 find that they're time barred is one that requires further
25 factual development. Having reached that analysis, I then

1 found starting at Page 28 of the memorandum of decision that
2 the analysis has little to no bearing on the ultimate outcome
3 because of the second alternative ground in the original Rule
4 59 ruling, which concluded that Statek should not prevail
5 under Rule 59 because it had not raised the Van Dusen and
6 Ferens arguments until after the Court had made its decision
7 and in fact had argued for basically every possible
8 application of other jurisdictional -- other jurisdictions'
9 law with the exception of Connecticut law. I believe that the
10 opinion makes this especially clear, actually, starting on
11 Page 28. So that aspect of the present motion also does not
12 justify relief under Rule 59.

13 Finally, and this is a closer question, Statek in
14 its reply to the plan administrator's objection to its present
15 Rule 59 motion has pointed to a paragraph in Coudert's brief
16 to the Second Circuit in which Coudert does point out that
17 Statek has not appealed the second aspect of the Court's
18 opinion, which, again, was that the Rule 59 motion should be
19 denied because Statek did not raise the Van Dusen argument
20 until too late, i.e. until after the Court ruled.

21 As I stated in the memorandum of decision, the Court
22 reviewed the appellate record and actually listened to the
23 oral arguments to see whether in fact the second prong of the
24 Court's decision ever was considered, and concluded that
25 Statek had never addressed it in its appeal and as importantly

1 if not more importantly that the Second Circuit had not
2 considered it. Certainly in the hearing on remand this was
3 the view taken by the parties, including, expressly, by
4 Statek, including in the supplemental briefing that I asked
5 for on the law of the case issue and on the meaning of the
6 remand. I do not believe I overlooked this paragraph or this
7 argument, therefore, which as noted by counsel for the plan
8 administrator today appears in the procedural history section
9 of the appellate brief. Of course only the Court of Appeals
10 really knows, I think, what was before it and they're
11 certainly free to disagree with me if in fact they did
12 consider this issue. But I have concluded that it did not, in
13 part because of the true paucity of the record on the issue
14 both in front of Judge Hellerstein and on appeal to the Second
15 Circuit, and because Statek never raised it on appeal, and
16 because of the position of this paragraph in the brief, and,
17 perhaps most importantly because I find it almost
18 inconceivable that the Second Circuit would have on this
19 record meant to rule contrary to extremely well established
20 case law (which I went into in painful detail in the
21 memorandum of decision) on the importance of limiting Rule 59
22 relief to not include the arguments and its -- the incredibly
23 adverse effect a change in that caselaw would have on how
24 trial courts conduct their business.

25 This principle has continued to be reiterated,

1 including by the Second Circuit after its ruling, after its
2 remand ruling, as noted by the plan administrator in its
3 brief, including in Bank of America National Association v.
4 AIG Financial Products Corp., 2013 WL 322922, Page 3 (2d Cir.
5 January 29, 2013), and a host of District Court cases. I just
6 don't believe they decided this issue. If they had, I think
7 there would be banner headlines.

8 So I don't believe that this basis for the motion,
9 which again was asserted in the reply (but that's fine), also
10 supports Rule 59 relief. So I will deny the motion for the
11 reasons stated and obviously will find out the answer on
12 appeal.

13 As far as the second motion before -- well, let me
14 just say before I turn to the second motion before me. There
15 was an additional prong in the present Rule 59 motion, which
16 was a motion for leave to amend Statek's complaint as set
17 forth on the record. That request really was tied into
18 Statek's concern that the Court would require a showing in the
19 complaint with regard to a tolling response to a statute of
20 limitations defense. I do not believe a complaint must show
21 that. That's an issue that would be developed in essence in a
22 special factual hearing once the defense is raised and the
23 tolling argument is raised in response. The request was
24 coupled with a motion for leave under Rule 59 and therefore
25 is -- was procedurally proper but I've concluded that in

1 weighing the balance between a request under Rule 15 made
2 after the entry of judgment that in light of the unnecessary
3 nature of the amendment and the fact that at least on the
4 basis of my ruling today it would be futile anyway, because it
5 wouldn't deal with the real reason I denied the motion for
6 reconsideration on remand, that the motion for leave under
7 Rule 15 also should be denied. See Williams v. CitiGroup,
8 Inc., 659 F.3d 208, 213 through 214 (2d Cir. 2011).

9 Then, turning to the second motion, which is the
10 motion by the plan administrator to strike a portion of
11 Statek's designation of record on appeal, this motion sought
12 to strike the inclusion of the materials, the pleadings and
13 ultimately I guess the Court's order on the present
14 reconsideration motion as part of the appellant record as a
15 legal matter. That's correct. It wouldn't properly be part
16 of, I believe, the appellate record, but, as Mr. Clark noted
17 the clear likelihood of an appeal from my present decision, it
18 will be part of that record and I'm sure will be accessible to
19 the Second Circuit, which is also always free to look at a
20 reconsideration ruling since that's a matter of public record
21 on the docket.

22 So I'll grant that motion to strike but obviously
23 there will be a whole second record on the present motion in
24 light of the inevitability of an appeal.

25 So I'm going to ask you on behalf of the plan

1 administrator to email chambers the two orders, and you should
2 copy Mr. Clark on those so he can make sure they're consistent
3 with my ruling.

4 MS. FRIEMAN: Of course, Your Honor. Thank you.

5 MR. CLARK: Thank you, Your Honor.

6 (Proceedings concluded at 1:25 p.m.)

7 * * * * *

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

29

I certify that the foregoing is a court transcript from
an electronic sound recording of the proceedings in the above-
entitled matter.

4

5

6

Shari Riemer

7 | Dated: October 28, 2013

8

9

10

11

12

13

14

15

16

17

18

10

20

21

20

22

84

25